IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

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| WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation | ) | |
| Plaintiff, | ) | No. 2:00-CV-2041-AJS |
| v. | ) | |
| PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual | ) | |
| Defendants | ) | |

**DEFENDANT CHARLES VON BERNUTH'S BRIEF IN OPPOSITION TO MOTION TO MODIFY ORDER OF FEBRUARY 20, 2007 TO EXPRESS THAT COUNTERCLAIMS WERE DISMISSED, OR, IN THE ALTERNATIVE, IN SUPPORT OF MOTION TO MODIFY ORDER OF JULY 29, 2005**

Implicitly recognizing that the Court's February 27, 2007 Order was not final because of the various counterclaims and other claims that remained pending, Plaintiff WRS, Inc. ("WRS") now proposes to fix that problem by asking the Court to modify its February 20, 2007 entry of default judgment against various defendants to include an after-the-fact dismissal of counterclaims, including the one filed by Charles von Bernuth (“Mr. von Bernuth”). WRS seeks this expansion of the order to dismiss counterclaims even though its Motion Pursuant to F.R.C.P. 55 for Entry of Default Judgment made no mention whatsoever of the counterclaims and even though WRS admits that the counterclaims were not expressly dismissed by the February 20, 2007 order. In a separate motion WRS attempts to fix a related problem by seeking a certification of finality under Rule 54(b) with respect to the award it has obtained against

Defendant John Herklotz. These attempts to create finality where none exists should be rejected.[1]

It is undisputed that the merits of the counterclaims have never been considered by this Court, and WRS makes no attempt to show that it would be entitled to judgment on the merits of those claims. Instead, WRS argues that the bankruptcy court's confirmation of WRS's Plan of Reorganization not only discharged WRS from any affirmative liability on the counterclaims, but also enjoined the pursuit of these counterclaims for purposes recoupment. Claims for recoupment, however, such as those at issue here, are not subject to the automatic stay and are not discharged in bankruptcy. *See University Medical Center v. Sullivan*, 973 F.2d 1065, 1079-81 (3d Cir. 1992); *Lee v. Schweiker*, 739 F.2d 870, 874-876 (3d Cir. 1984); *In re Harmon*, 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995); *In re Siouxland Beef Proc. Co.*, 55 B.R. 95, 100-101 (Bankr. N.D. Iowa 1985); *see also Folger Adam Security, Inc. v. DeMatteis*, 209 F.3d 252, 257-61 (3d Cir. 2000) (recoupment is a defense and is not a claim or interest, and thus is not extinguished and survives "free and clear" sale under 11 U.S.C. § 363(f)).

Adhering to this law, WRS's Seconded Amended Plan of Reorganization (the "Plan"), attached hereto as Exhibit A,[2] does not even purport to discharge rights of

[1] In fact, even if the counterclaims were deemed to have been dismissed by the February 20, 2007 Order, that would not have created finality such that this case could have properly gone on appeal when it did because the severed cross-claims also remained to be adjudicated at that time. Severance under Rule 21, which WRS has cited in a recent filing in the Third Circuit, does create two separate actions each capable of reaching final judgment, but severance under Rule 42 does not. *See Gaffney v. Riverboat Servs.*, 451 F.3d 424, 442 (7th Cir. 2006). In severing the cross-claims, this Court did not state that it was proceeding under Rule 21 and more importantly, it could not have done so. Claims may be severed under Rule 21 only when they are "discrete and separate." *Id.* "In other words, one claim must be capable of resolution despite the outcome of the other claim." *Id.* Where claims are "factually interlinked" or where "final resolution of one claim affects the resolution of the other," severance for separate trial pursuant to Rule 42 may be appropriate, but severance pursuant to Rule 21 is impermissible. *Id.* at 441-444. Because Defendant Herklotz's cross-claims are dependent on the resolution of Plaintiff's claims against such other defendants, severance under Rule 21 would not have been warranted.

recoupment or set-off. Rather, the Plan speaks only of the discharge of affirmative "claims." Exhibit A, at 8. As recognized by the United States Court of Appeals for the Third Circuit, the defense of recoupment is not a "claim," *see Folger Adam Security, Inc.*, 209 F.3d at 260, and thus the Plan's discharge of "claims" has no effect on the defense of recoupment.

Moreover, the equities clearly do not support modifying this Court's Order entering default to extend the dismissal to include counterclaims not mentioned in the motion pursuant to which the order was entered. WRS was well aware of the counterclaims asserted in this case. One such claim had already been asserted in this action prior to the bankruptcy filing, and the others were asserted during the pendency of the bankruptcy proceedings, yet WRS did not include the Defendants in the Schedules of Creditors it filed in the bankruptcy court. *See* Exhibit B. Nor did WRS contend that the counterclaims violated the automatic stay in the Reply to Counterclaim it filed in this action during the pendency of the bankruptcy proceedings. WRS's failure to include the counterclaims in its Schedules and to assert the bankruptcy proceedings as a defense to the counterclaims reinforces the conclusion already inescapable from the language of the Plan itself, to wit, that it was not intended that the bankruptcy would impair the counterclaims, at least insofar as they constitute a recoupment defense. Furthermore, it would be inequitable to allow WRS to lull the Defendants into believing that their counterclaims would not be impaired only to change its position now.

In a similar vein, when WRS sought to reopen this case, which had been administratively closed during the bankruptcy proceedings after its counsel had withdrawn his appearance, it relied almost exclusively on the ground of equity, asserting

[2] Given the Plan is not paginated, page numbers have been added for ease of reference.

that it would be "fundamentally unfair" to make it file a new action and thereby subject it to defenses such as the statute of limitations that had arisen as a result of the bankruptcy proceedings and its inherent delays. *See* Brief of Plaintiff WRS, Inc. in Support of Its Motion to Reopen the Case (Exhibit C hereto), at 8.[3] Moreover, WRS assured this Court that "Defendants will suffer no detriment by resuming this litigation . . . ." *Id.* at 15. The Court accepted this argument, holding that it would be "fundamentally unfair to deny WRS's motion to reopen the case." (Memorandum Opinion dated July 29, 2005, at 9.) It would be even more unfair, however, to allow WRS to reopen the case on equitable grounds and thus to assert its claims free of statute of limitations and other defenses that may have arisen during the bankruptcy proceedings, while holding that the same bankruptcy proceedings had the effect of extinguishing the Defendants' counterclaims. Indeed, if the law required the dismissal of the counterclaims, which it does not, this inequity would provide a compelling basis for modifying this Court's July 29, 2005 Order reopening the case.

Finally, the merits of the counterclaims have never been addressed because of an attorney's extreme dereliction. The gross neglect reflected in the Affidavit of John W. Gibson warrants opening and/or reconsidering the judgment even as to the claims that were expressly adjudicated by this Court for reasons more explained fully in Mr. von Bernuth's Brief in Support of Motion for Reconsideration or for Relief from Judgment. In light of the egregious attorney misconduct in this case, the equities clearly do not favor expanding the scope of this Court's entry of default.

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[3] For ease of reference, page numbers have been added to this Brief, which was filed without page numbers.

For the foregoing reasons, Mr. von Bernuth respectfully requests that this Court enter an Order denying the Motion to Modify Order of February 20, 2007 Entering Default Judgment as to Defendants Eric Parkinson, Charles von Bernuth and Plaza Entertainment, Inc., to Express that Counterclaims Were Dismissed, or, in the alternative, enter an Order modifying this Court's Order of July 29, 2005 to deny WRS's Motion to Reopen the Case.

Respectfully submitted,

/s/ James R. Walker

James R. Walker, Esquire
Pa I.D. # 42175
jwalker@mmlpc.com
Manion McDonough & Lucas, P.C.
600 Grant Street, Suite 1414
Pittsburgh, PA 15219
(412) 232-0200

Attorneys for Defendant Charles Von Bernuth

Date: November 26, 2007

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by the Court's ECF/CM system and by U.S. First Class Mail, Postage Pre-Paid, upon the on this 26th day of November, 2007, as follows:

John P. Sieminski, Esquire
Burns, White & Hickton, LLC
Four Northshore Center
106 Isabella Street
Pittsburgh, PA 15212

Thomas E. Reilly, Esquire
2025 Greentree Road
Pittsburgh, PA 15220

John W. Gibson
912 Fifth Avenue
Pittsburgh PA 15219

/s/ James R. Walker___________